



Voluntary Departure

New JLC Training 2018



Voluntary Departure (VD)

- Permits an alien to leave the United States voluntarily and “at the alien’s own expense” without formal removal.
 - Section 240B of the Act.
 - 8 CFR § 1240.26
 - Caselaw



Voluntary Departure (VD)

- Avoid removal order.
- Subsequent return to the United States may be easier if desired.
- But – carries risk of penalties & adverse consequences if non-compliant.



Voluntary Departure (VD)

- Respondent has the burden of proof, and he or she must demonstrate:
 - (1) eligibility, and
 - (2) that he or she warrants a favorable exercise of discretion.



Voluntary Departure (VD) – Three Types

- **DHS** - prior to initiation of removal proceedings.
- **Pre-Conclusion** - at the initial stages of removal hearing. Section 240B(a) of the Act.
 - FEWER REQUIREMENTS; REDUCED LITIGATION OPTIONS.
- **Post-Conclusion** - at the conclusion of the removal hearing. Section 240B(b) of the Act.
 - MORE REQUIREMENTS; INCREASED LITIGATION OPTIONS.

See Matter of Arguelles-Campos, 22 I&N Dec. 811 (BIA1999)
(detailed discussion of all three types).



Bars To Eligibility for Pre- or Post-Conclusion VD

- **Past Grant of VD** – ineligible if granted VD in the past after being found inadmissible under 212(a)(6)(A) (in the U.S. without admission or parole).

240B(c); 8 CFR § 1240.26 (previously granted VD and failed to depart).

- **Removable under 237(a)(4) (security and related grounds, including terrorist activity).**

240B(a)(1); 8 CFR §§ 1240.26(b)(1)(i)(E), 1240.26(c)(1)(iii).

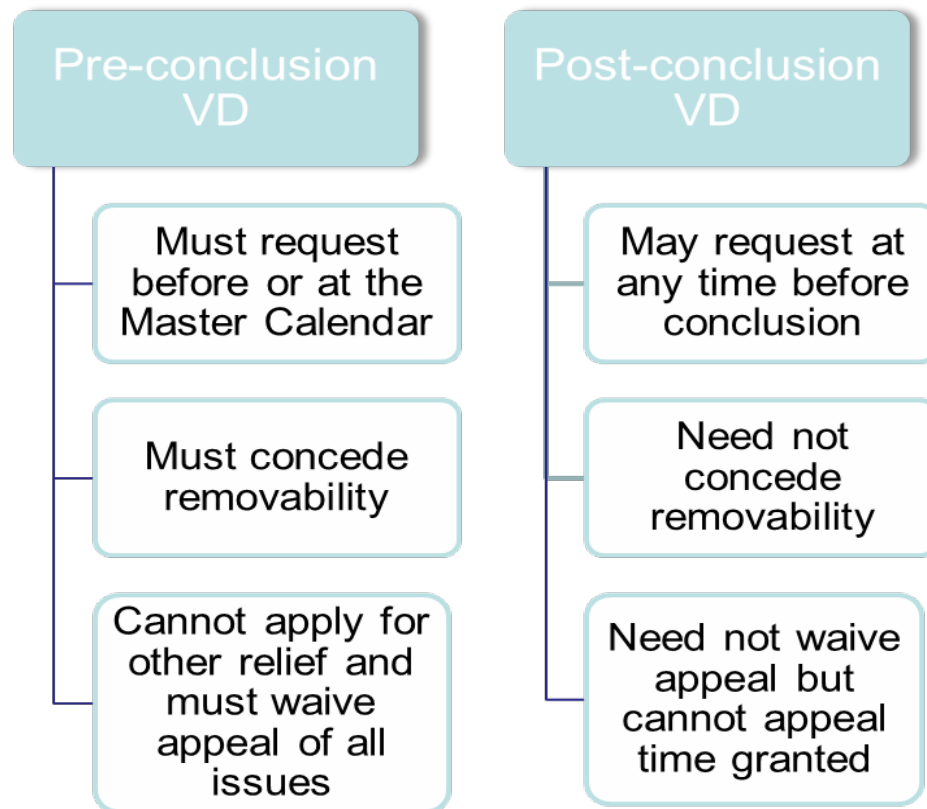
- **Convicted of an aggravated felony**

240B(a)(1); 8 CFR §§ 1240.26(b)(1)(i)(E) and 1240.26(c)(1)(iii).

Section 101(a)(43) of the Act (aggravated felony definition).

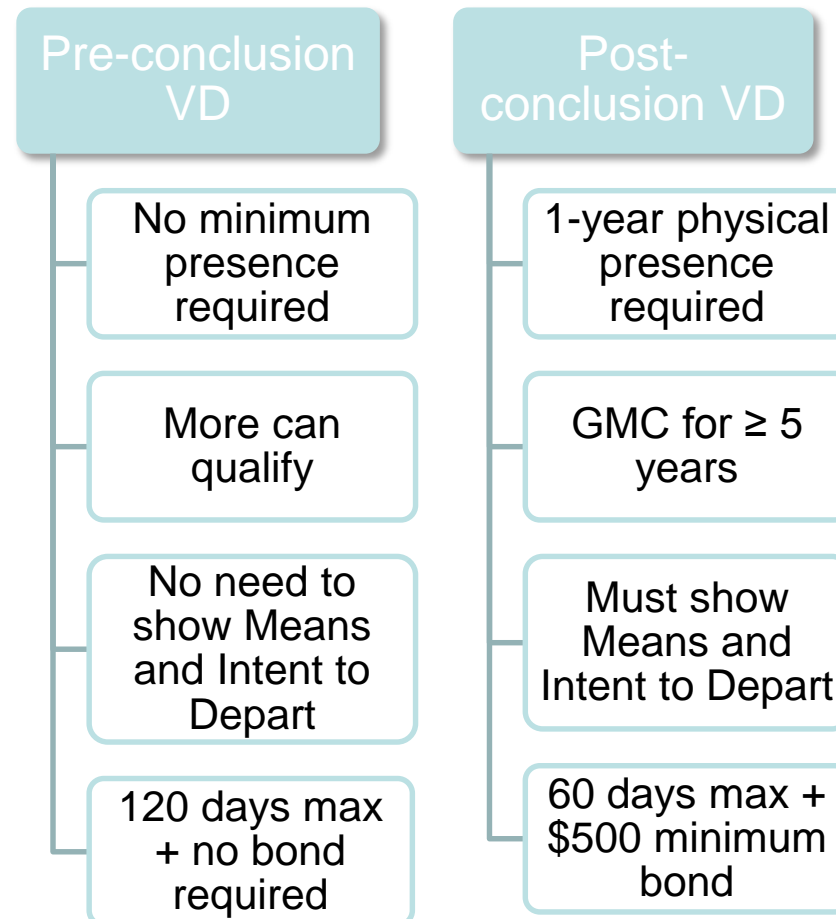


Comparison of Pre- and Post-Conclusion VD





Comparison of Pre- and Post-Conclusion VD (cont'd)





Pre-Conclusion VD – 8 C.F.R. §1240.26(b).

- Timing element (30 days after MC hearing, etc.).
See Matter of Cordova, 22 I&N Dec. 966 (BIA 1999) (discussing what is a “master calendar” hearing).
- Stipulated grant possible at anytime.
- R can make no additional requests for relief (must withdraw any pending requests).
- R must concede removability.
- Arriving aliens not eligible.



Pre-Conclusion VD – 8 C.F.R. §1240.26(b) (cont'd)

- R must waive appeal of all issues.
- Express waiver by R or R's counsel; a "constructive waiver" will not suffice. *Matter of Ocampo*, 22 I&N Dec. 1301 (BIA 2000).
- Knowing and intelligent waiver.
- See, e.g., *Narine v. Holder*, 559 F.3d 246 (4th Cir. 2009) (remanding where pro se alien did not have clear understanding of consequences of waiver).
- Waiver usually found in transcript.



Post-Conclusion VD – 8 C.F.R. §1240.26(c)

- At least 1 year of physical presence preceding service of NTA.
- Good moral character for at least 5 years immediately preceding application (ongoing application).
- GMC definition at INA § 101(f)—use guidance from cases addressing other forms of relief.
- Clear and convincing evidence of means and intent to depart the United States.



Discretion – Element for Both Kinds of VD

- Weigh positive and negative factors including:
 - the nature and underlying circumstances of the removal grounds at issue,
 - additional violations of the immigration laws,
 - the existence, seriousness, and recency of any criminal record,
 - other evidence of bad character or the undesirability of the applicant as a permanent resident,
 - length of residence,
 - family ties in the US, and
 - humanitarian needs.
- *Matter of Arguelles-Campos*, 22 I&N Dec. 811, 817 (BIA 1999) (citing to *Matter of Gamboa*, 14 I&N Dec. 244 (BIA 1972)).



Fines, Bonds & Conditions

- **Fines**
 - Pre & post - IJ sets a fine for failure to depart.
 - There is a rebuttable presumption of a \$3,000 amount.
 - 8 CFR § 1240.26(j).
- **Bond**
 - Not mandatory for pre-conclusion.
 - Mandatory for post-conclusion.
 - Amount necessary to ensure that the alien departs within the time specified.
 - Not less than \$500.
 - 8 CFR § 1240.26(c)(3)(i).



Fines, Bonds & Conditions

- **Conditions**
- May be imposed as IJ “deems necessary to ensure the alien’s timely departure from the United States.” 8 CFR §§ 1240.26(b)(3)(i) - (pre), (c)(3) - (post).
 - Pre-conclusion – includes posting of bond.
 - Post-conclusion – IJ has broad discretion to set conditions and safeguards.
- IJ should advise of conditions before grant.



Fines, Bonds & Conditions

***Matter of M-A-S-*, 24 I&N Dec. 762 (BIA 2009)**

- IJs may also order continued detention of alien until his/her VD or give permission to voluntarily depart “under safeguards.”
- No language explicitly stating “continued detention,” but 8 C.F.R. § 1240.26(c)(3) gives IJs broad discretion to set conditions for VD.
- Where continued detention is ordered, no sense in requiring a bond, because the purpose of the bond is fully served.



Travel Documents

Generally, R must provide a passport or other travel documentation sufficient to assure a lawful entry into the country to which R is departing, with certain exceptions.

- 8 CFR § 1240.26(b)(3)(i) (pre-conclusion)
- 8 CFR § 1240.26(c)(2) (post-conclusion)



Different Types of Advisals

- Advisals regarding potential eligibility for relief.
- Advisals regarding requirements and consequences.
- IJ – before opportunity to request and at time of grant.
- BIA - when reinstating VD on appeal.



Advisals Regarding Potential Eligibility

- IJ must advise R of forms of relief for which he/she is apparently eligible, including VD.

Matter of Cordova, 22 I&N Dec. 966, 970, n.4 (BIA 1999); 8 CFR § 1240.11(a)(2).

- Advisals must be timely, e.g., pre-conclusion applies only in early stages of proceedings.

Matter of Cordova, supra.



Advisals re Eligibility, cont'd

- If R not eligible for pre-conclusion, then IJ must consider availability of post-conclusion VD.
See Matter of C-B-, 25 I&N Dec. 888 (BIA 2012)
(remanded where R indicated he would not waive appeal so not eligible for pre-conclusion, but IJ did not consider his eligibility for post-conclusion).
- IJ must be clear whether addressing pre and post in giving advisals and when issuing decision.
Matter of C-B-, *supra*.



Advisals re Consequences

- **Consequences of failing to voluntarily depart -**
 - Alternative order of removal (issued by IJ) will automatically take effect.
- **Penalties -**
 - An alien who fails to depart within the time period specified in the VD order becomes subject to a civil penalty between \$1,000 and \$5,000 (presumptive amount of \$3000)



Advisals re Consequences

Other Adverse Consequences -

- Alien ineligible for all forms of discretionary relief (INA §§ 240A, 245, 248, & 249) for 10 years after the date the alien was supposed to depart. See section 240B(d)(1)(B).

Note: if VD granted in 1995 or earlier – automatic bar of 5 years rather than 10



Advisals re Bond

Bond

- Amount to be posted, and duty to post **within 5 days** of IJ's order (before grant).
- Consequence of not timely posting bond: VD order vacates and alternate removal order takes effect. See 8 CFR § 1240.26(c)(3).
- If appeal filed, proof to BIA that bond timely paid **within 30 days** of filing the appeal or Board will not reinstate VD.



Advisals re Motions

Motions

- If R files MTR or MTRRecon within VD period, VD grant automatically terminates, and the alternate removal order takes effect immediately. 8 CFR § 1240.26(c)(3)(iii), (e)(1); *see also* 8 CFR § 1240.11(b).

For full picture of interplay of VD grants, motions (including untimely motions), and the filing of PFRs, see the regulations. *E.g.*, 8 CFR §§ 1240.26(e)-(i).



Advisals – Importance

See Matter of Gamero, 25 I&N Dec. 164 (BIA 2010).

“Where the Immigration Judge did not provide all the advisals that are required upon granting voluntary departure and the respondent failed to submit timely proof to the Board that a voluntary departure bond had been posted, the record was remanded for the Immigration Judge to grant a new period of voluntary departure and to provide the required advisals.”

- Advisals may be in writing or oral - see standard Notice to be given to respondent and included in the record



U.S. Department of Justice
Executive Office for Immigration Review

Sample Notice – Non-Detained & Detained

NOTICE TO RESPONDENTS GRANTED VOLUNTARY DEPARTURE

NAME: _____ A# _____

You have been granted the privilege of voluntarily departing from the United States of America, The Court advises you that, if you fail to voluntarily depart the United States within the time period specified, a removal order will be automatically entered against you. Pursuant to section 240B(d) of the Immigration and Nationality Act, you will also be subject to following penalties:

1. You will be subject to a civil penalty of not less than \$1,000 and not more than \$5,000; and
2. You will be ineligible, for a period of 10 years, to receive cancellation of removal, adjustment of status, registry, voluntary departure, or a change of nonimmigrant status.

The Court further advises you that:



Sample Notice – Non-Detained

You have been granted pre-conclusion voluntary departure.

1. If you file a motion to reopen or reconsider during the voluntary departure period, the grant of voluntary departure will be terminated automatically, the alternate order of removal will take effect immediately, and the penalties for failure to depart voluntarily under section 240B(d) of the Act will not apply. 8 CFR § 1240.26(b)(3)(iii).
2. There is a civil monetary penalty if you fail to depart within the voluntary departure period. In accordance with the regulation, the Court has set the presumptive amount of \$3,000 (or _____ instead of the presumptive amount). 8 CFR § 1240.26(j).



Sample Notice – Non-Detained

You have been granted post-conclusion voluntary departure.

1. If the Court set any additional conditions, you were advised of them, and were given an opportunity to accept or decline them. As you have accepted them, you must comply with the additional conditions. 8 C.F.R. § 1240.26(c)(3).
2. The Court set a specific bond amount. You were advised of the bond amount, and were given an opportunity to accept or decline it. As you have accepted it, you have a duty to post that bond with the Department of Homeland Security, Immigration and Customs Enforcement, Field Office Director within 5 business days of the Court's order granting voluntary departure. 8 C.F.R. § 1240.26(c)(3)(i).



Sample Notice – Non-Detained

You have been granted post-conclusion voluntary departure.

3. If you have reserved your right to appeal, then you have the absolute right to appeal the decision. If you do appeal, you must provide to the Board of Immigration Appeals, within 30 days of filing an appeal, sufficient proof of having posted the voluntary departure bond. The Board will not reinstate the voluntary departure period in its final order if you do not submit timely proof to the Board that the voluntary departure bond has been posted. 8 CFR § 1240.26(c)(3)(ii).



Sample Notice – Non-Detained

You have been granted post-conclusion voluntary departure.

4. If you do not appeal and instead file a motion to reopen or reconsider during the voluntary departure period, the period allowed for voluntary departure will not be stayed, tolled, or extended, the grant of voluntary departure will be terminated automatically, the alternate order of removal will take effect immediately, and the penalties for failure to depart voluntarily under section 240B(d) of the Act-will not apply. 8 C.F.R. §§1240.26(c)(3)(iii), (e)(1).



Sample Notice – Non-Detained

You have been granted post-conclusion voluntary departure.

5. There is a civil monetary penalty if you fail to depart within the voluntary departure period. In accordance with the regulation, the Court has set the presumptive amount of \$3,000 (or _____ instead of the presumptive amount). 8 C.F.R. § 1240.26(j).



Sample Notice – Detained

You have been granted pre-conclusion voluntary departure under safeguards.

1. If you file a motion to reopen or reconsider during the voluntary departure period, the grant of voluntary departure will be terminated automatically, the alternate order of removal will take effect immediately, and the penalties for failure to depart voluntarily under section 240B(d) of the Act will not apply. 8 CFR § 1240.26(b)(3)(iiii).
2. There is a civil monetary penalty if you fail to depart within the voluntary departure period. In accordance with the regulation, the Court has set the presumptive amount of \$3,000 (or _____ instead of the presumptive amount). 8 CFR § 1240.26(j).



Sample Notice – Detained

You have been granted post-conclusion voluntary departure under safeguards.

1. If the Court set any additional conditions, you were advised of them, and were given an opportunity to accept or decline them. As you have accepted them, you must comply with the additional conditions. 8 C.F.R. § 1240.26(c)(3).
2. The Court did not set a specific bond amount, but has granted voluntary departure under safeguards. *See Matter of M-A-S-*, 24 I&N Dec. 762 (BIA 2009).
3. If you have reserved your right to appeal, then you have the absolute right to appeal the decision.



Sample Notice – Detained

You have been granted post-conclusion voluntary departure under safeguards.

4. If you do not appeal and instead file a motion to reopen or reconsider during the voluntary departure period, the period allowed for voluntary departure will not be stayed, tolled, or extended, the grant of voluntary departure will be terminated automatically, the alternate order of removal will take effect immediately, and the penalties for failure to depart voluntarily under section 240B(d) of the Act-will not apply. 8 C.F.R. §§1240.26(c)(3)(iii), (e)(1).
5. There is a civil monetary penalty if you fail to depart within the voluntary departure period. In accordance with the regulation, the Court has set the presumptive amount of \$3,000. 8 C.F.R. § 1240.26(j).



VD - Scenarios

1. Respondent arrived in the United States in June of 2017. She is accompanied by her two minor children. All three are issued NTAs and placed into proceedings. They assert a gang based asylum claim which you deny following a hearing in February 2018. At the conclusion of the hearing you are inclined to grant the family post conclusion voluntary departure. Are you able to do that?



VD - Scenarios

2. Respondent is detained. He has been convicted of stealing \$22,000 from his employer. Respondent is charged with having entered without inspection. He appears at a master calendar hearing and requests pre-conclusion voluntary departure. Can you grant that request?



VD - Scenarios

3. Respondent has been in proceedings for three years. At a master calendar two years ago, you scheduled the merit hearing and set a filing deadline. Respondent asserts a claim for Non-LPR Cancellation. On the date of the merits hearing, Respondent appeared with counsel and indicated that the qualifying relative - a child – had recently turned 22. Consequently, they request to withdraw with prejudice the 42B application and request 120 days pre-conclusion voluntary departure. The government does not object. Are you able to grant the request if you are otherwise inclined to?
4. Same facts as in number 3 with one modification. In the event that the government objects to the request for pre-conclusion voluntary departure, can you grant the request over the government's objection?



VD - Scenarios

5. You are hearing a Non-LPR cancellation case. Respondent testifies that if his application is denied he is requesting post-conclusion voluntary departure in the alternative. He testifies that he has a valid unexpired passport, \$2500 in cash to buy a ticket and agrees to leave the United States within the time provided by the Court. Respondent has no criminal record. Is he eligible for post-conclusion voluntary departure?



VD - Scenarios

6. Respondent is detained. She is charged as an arriving alien. She appears pro se at an initial master calendar, admits the allegations, concedes removability, and designates Romania as the country of removal. She has no criminal record and requests no relief. She says to you “I am only asking for voluntary departure.” Can you grant her request?



VD - Scenarios

7. Respondent is on your non-detained docket. He is charged as an EWI. At the initial master, respondent appears with counsel and admits the charges, concedes removability and designates a country of removal. Counsel identifies no relief and requests 30 days pre-conclusion voluntary departure. Counsel tells you that Respondent has a consular interview overseas in three weeks and already has an airplane ticket purchased. The government objects and tells you that Respondent was previously in proceedings in Texas charged as having entered without inspection and was granted voluntary departure by an IJ in Houston three years ago. Can you grant pre-conclusion voluntary departure?



VD - Scenarios

8. Respondent is before you at a master calendar and requests pre-conclusion voluntary departure. Removability has been established. DHS objects and gives you the I-213 which reflects that Respondent has been given four prior voluntary returns by Customs and Border Patrol agents in the last three years. Is the Respondent eligible for pre-conclusion voluntary departure? Is this a discretionary factor?



VD - Scenarios

9. During a merits hearing, Respondent requests voluntary departure in conjunction with an adverse ruling on the merits of his application. You learned during the hearing that Respondent has pending criminal charges for Domestic Violence Family Battery. He is out on bond awaiting trial on the criminal case. DHS “defers to your judgment” on the voluntary departure issue. May you consider the pending criminal charge in evaluating the request?



VD - Scenarios

10. Respondent was before you three years ago. You granted her request for voluntary departure and set a departure date. Respondent did not leave the United States. Respondent has now filed a Motion To Reopen stating that she is now the beneficiary of an Approved I-130 filed by a recent spouse and wants to adjust her status. Is the Respondent eligible for adjustment of status?



Standard Forms for VD

- Notice to Respondent Granted Voluntary Departure with Advisals for Pre- and Post-Conclusion VD (Word Document or Case VD Notice Template)
- CASE Form EOIR 6 – VC (Vol. Depart. – REMOVAL)- Post-conclusion VD - solely applying for VD – includes advisals
- CASE Form EOIR-6 – VB (Vol. Depart. – REMOVAL) – Pre-conclusion VD – includes advisals
- Other form orders may be used as well, see, e.g. Q6, Y2, BUT THESE FORMS DO NOT INCLUDE THE ADVISALS – Must provide advisals orally and/or in writing

